

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 98-0119ST**

**Sales and Use Tax
For Tax Periods: 1994 through 1996**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superceded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax—Double Assessment

Authority: IC 6-2.5-2-1, IC 6-8.1-5-1, IC 6-8.1-5-4, IC 6-2.5-4-12

Taxpayer protests proposed assessments of use tax. Taxpayer contends one of the assessments was redundant.

II. Sales/Use Tax—Purchases at Auction

Authority: IC 6-2.5-2-1, IC 6-2.5-5-3, IC 6-8.1-5-1, IC 6-8.1-5-4

Taxpayer protests proposed assessments of use tax on its auction purchases.

III. Sales/Use Tax—Tires

Authority: IC 6-2.5-2-1, IC 6-2.5-5-3, IC 6-8.1-5-1, IC 6-8.1-5-4

Taxpayer protests proposed assessments of use tax on its purchase of tires.

IV. Sales/Use Tax—Casual Sales

Authority: IC 6-2.5-2-1, IC 6-2.5-3-2

Taxpayer protests the proposed assessment of use tax on its purchase of machinery from an individual seller.

V. Sales/Use Tax—3000 Trogen Endloader and Loader Bucket

Authority: IC 6-2.5-2-1, IC 6-2.5-5-3, IC 6-8.1-5-1, IC 6-8.1-5-4

Taxpayer protests proposed assessments of use tax on equipment that, according to taxpayer, was used exclusively for exempt purposes.

VI. Sales/Use Tax—Parts and Labor: Installation of Truck Parts

Authority: IC 6-2.5-1-1, IC 6-2.5-2-1, IC 6-2.5-4-1, IC 6-8.1-5-1,
IC 6-8.1-5-4

Taxpayer protests proposed assessments of use tax on its purchase of services.

VII. Sales/Use Tax—Komatsu 300 Excavator

Authority: IC 6-2.5-5-3, IC 6-8.1-5-1, IC 6-8.1-5-4

Taxpayer protests proposed assessments of use tax on an excavator.

VIII. Tax Administration — Negligence Penalty

Authority: IC 6-8.1-10-2.1
45 IAC 15-11-2

Taxpayer protests imposition of a ten-percent (10%) negligence penalty.

STATEMENT OF FACTS

Taxpayer is engaged in the construction, excavation, and demolition business. Activities provided by taxpayer include earth-moving, building demolition, flood control projects, city sewer systems, waste water treatment facilities, and levee and dam construction. Additionally, taxpayer operates a gravel pit where sand, stone, gravel, and septic rock is processed and sold.

During the audit period (1994-1996), taxpayer failed to pay sales tax on its acquisition of tires, tools, supplies, machinery, and equipment. Consequently, Audit proposed additional assessments of use tax. Taxpayer protests these proposed assessments.

I. Sales/Use Tax—Double Assessment

DISCUSSION

Retail transactions made in Indiana are subject to sales tax; the person who acquires property in a retail transaction subject to sales tax shall pay the tax to the retail merchant as an amount additional to the consideration in the transaction. IC 6-2.5-2-1. Conversely, use tax “is imposed

on the storage, use, or consumption of tangible personal property in Indiana when the sales tax has not been paid. IC 6-2.5-3-2 and IC 6-2.5-3-4.

Taxpayer has been assessed use tax on two (2) purchases—one listed as “tools,” the other as a “sign.” Both valued at \$925.00. Both purchased September 14, 1994. As sales tax was not paid on these purchases, Audit proposed use tax assessments on \$1,850.00. Taxpayer insists only one (1) purchase of \$925.00 was made on September 14, 1994.

During audit, an invoice for \$925.00 was noted. This invoice represented taxpayer’s purchase, at auction, of a concrete saw (\$100.00), a pump (375.00), and a “Federal Arrow Board” (\$450.00). The invoice was dated September 14, 1994. Audit also noted a \$925.00 entry in taxpayer’s “Depreciation Schedule” for a “Sign.” This entry was also dated September 14, 1994.

The evidence and circumstances strongly suggest taxpayer made only one \$925.00 purchase on September 14, 1994. On that day, taxpayer purchased three items—a saw, a pump, and one federal arrow board—from one vendor. The federal arrow board, however, was actually a sign. Later, the three items were entered as one on taxpayer’s “Depreciation Schedule.” The label given to this consolidated entry was “sign.”

FINDING

Taxpayer’s protest is sustained.

II. Sales/Use Tax—Purchases at Auction

DISCUSSION

Taxpayer argues items purchased at auction—i.e., the saw, pump, and “sign”—are exempt from sales tax because the items were purchased at auction.

IC 6-2.5-4-12 addresses the taxation of sales made at auction. The language reads:

- (a) A person is a retail merchant making a retail transaction when he sells tangible personal property at auction.
- (b) Notwithstanding subsection (a), a person is not a retail merchant making a retail transaction when:
 - (1) he makes isolated or occasional sales of tangible personal property at auction;
 - (2) the sales occur on the premises of the owner of the tangible personal property; and
 - (3) the owner of the tangible personal property did not originally acquire that property for resale.

Taxpayer’s purchases do not qualify for the exemption provided by IC 6-2.5-4-12. The items taxed were purchased by taxpayer from a commercial auction house. Such vendors acquire tangible personal property (via purchase or consignment) for purposes of resale. Consequently, the requirements of subsection (b)(3) have not been met.

FINDING

Taxpayer's protest is denied.

III. Sales/Use Tax—Tires Purchased

DISCUSSION

Taxpayer protests proposed assessments of use tax on tires purchased for exempt machinery. Specifically, these tires were purchased for a loader and mechanized end-dump that taxpayer contends were used at its exempt gravel pit production site.

IC 6-2.5-5-3(b) provides for the following exemptions:

“Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.”

Taxpayer is engaged in a variety of activities—some exempt, some not. Construction and excavation represent nonexempt service activities. Taxpayer's gravel pit operation, however, falls within the scope of “mining” or “processing”—both exempt activities. Audit assessed use tax on taxpayer's acquisition of these tires because at the time of the audit taxpayer failed to document its assertion that the tires were mounted on equipment used exclusively in exempt operations. At hearing, taxpayer demonstrated the tires are mounted on exempt machinery.

FINDING

Taxpayer's protest is sustained.

IV. Sales/Use Tax—Casual Sales

DISCUSSION

Taxpayer purchased equipment (Cat Roller 825B) for use in nonexempt business activities. Taxpayer failed to pay sales tax on this acquisition. Audit, therefore, proposed additional assessments of use tax.

Retail transactions made in Indiana are subject to sales tax. The person who acquires property in a retail transaction “shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction.” IC 6-2.5-2-1(b).

Taxpayer protests this particular assessment of use tax because the machinery was not purchased in a retail transaction. Rather, the machinery was purchased in a “casual sale” from a third-party individual. Taxpayer relies on the language of 45 IAC 2.2-1-1(d), which provides:

Casual Sales. The Indiana gross retail [sales] tax is not imposed on gross receipts from casual sales of motor vehicles and sales of rental property. A casual sale is an isolated or occasional sale by the owner of tangible personal property purchased or otherwise acquired for his use or consumption, where he is not regularly engaged in the business of making such sales.

Also see *Information Bulletin #20, Sales Tax*, (April 18, 1983).

Taxpayer purchased the equipment from a retail vendor (“Vendor”). The cancelled check and “picking” slip indicate the equipment was ordered and billed from Vendor. Taxpayer insists that although the Vendor delivered the machinery to, and collected the purchase price from, taxpayer, those actions were taken on behalf of the actual seller—a third-party individual. The third-party individual has submitted a signed letter to that effect.

Notwithstanding any “agreement” between Vendor and the third-party individual, taxpayer purchased its equipment (as evidenced by the submitted documentation) from an Indiana registered retail merchant (i.e., the “Vendor”). Taxpayer did not issue exemption certificates or direct pay permits. The Vendor, therefore, was required to collect sales tax on the transaction. IC 6-2.5-2-1. Sales tax, however, was not collected. Consequently, taxpayer now owes use tax on its acquisition of the Cat Roller 825B. IC 6-2.5-3-2.

FINDING

Taxpayer’s protest is denied.

V. Sales/Use Tax—3000 Trogen Endloader and Loader Bucket

DISCUSSION

Taxpayer protests proposed assessments of use tax on 20% of the cost of equipment (the 3000 Trogen Endloader and Loader Bucket) which, according to taxpayer, is used at its gravel pit in the direct production of sand and gravel.

Retail transactions made in Indiana are subject to sales tax. The person who acquires property in a retail transaction subject to sales tax shall pay the tax to the retail merchant. IC 6-2.5-2-1. Absent exemptions, if sales tax is not paid, use tax is owed. IC 6-2.5-3-2. In this instance, taxpayer failed to pay sales tax on these purchases.

An exemption from sales and use taxes is provided, pursuant to IC 6-2.5-5-3, for tangible personal property purchased and then used in certain production and manufacturing activities. Specifically, IC 6-2.5-5-3(b) states:

“Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.”

The burden of proving that an assessment made by the Department is erroneous rests with the person against whom the proposed assessment is made. IC 6-8.1-5-1(b). To this end, every person subject to such taxation must keep books and records so the Department may determine said person's tax liability based upon such documentation. Such records include all source documents necessary in determination of tax liability, including invoices, register tapes, receipts, and cancelled checks. IC 6-8.1-5-4.

Given the utility of taxpayer's equipment (i.e., the 3000 Trogen Endloader and Loader Bucket) and the nature of taxpayer's business activities (excavation and gravel production), taxpayer is entitled to a pro-rata exemption to the extent the equipment is used in taxpayer's gravel pit operations. IC 6-2.5-5-3(b). Audit assessed only 20% of the equipment's purchase cost, which is a reasonable pro-rata exemption absent more precise records from the taxpayer.

FINDING

Taxpayer's protest is denied.

Sales/Use Tax—Parts and Labor: Installation of Truck Parts

DISCUSSION

Taxpayer was assessed use tax on the purchase and installation of truck parts (invoice # 9258). Taxpayer concedes sales tax should have been paid on the parts. But taxpayer also contends sales tax should not have been paid—and, in fact, was not paid—on installation charges. As taxpayer failed to pay sales tax or remit use tax on any portion of the purchase price, Audit proposed additional assessments of use tax on the entire invoice amount—i.e., \$23,600.00. This amount represented the *purchase* and *installation* of two (2) truck axles.

In response to the Department's request for additional information, taxpayer submitted a signed statement from its vendor substantiating taxpayer's assertion that the actual value of tangible personal property purchased was \$18,760.00—with installation charges of \$4,840.00 representing the balance.

Given this additional information, the Department finds that taxpayer should have remitted use tax on \$18,760.00 for the parts purchased—but not on the remaining invoice amount of \$4,840.00.

FINDING

Taxpayer's protest is sustained.

VI. Sales/Use Tax—Komatsu 300 Excavator

DISCUSSION

Taxpayer protests a portion of the proposed assessment of use tax on its purchase of a Komatsu 300 Excavator ("excavator"). This excavator, according to taxpayer, was predominantly used (with two exceptions) in exempt gravel pit operations. Therefore, taxpayer reasons, to the extent the excavator was used in the direct production of sand and gravel, the excavator should qualify for an exemption. But according to Audit, taxpayer was unable to document the excavator's exempt and non-exempt utility. Consequently, Audit proposed assessments on the total purchase price of the excavator.

In response to the Department's request for additional information, taxpayer submitted the following explanation:

[The Komatsu 300] is a very big machine that is extremely heavy and overwidth [sic]. It was purchased to be used at the sand and gravel company to remove dirt (overburden) from on top of the sand and gravel. To move the machine requires special equipment and a special overwidth and overweight permit from the State Highway Department.

The construction company has two excavators of their own, but did get in a bind and had to use the 300 Komatsu in a couple of jobs. We have gone through our records and have found two jobs that this machine was used on. ... It [the Komatsu 300] was used a total of 432 hours. This was the extent of use outside of the gravel pit.

Taxpayer purchased the Komatsu 300 excavator on May 9, 1995. The audit period extended through December 31, 1996. Taxpayer owned the excavator for approximately nineteen (19) months (82 weeks) of the audit period. Taxpayer has stated the excavator was used two (2) times for a total of 432 hours. Assuming a fifty (50) hour work week, the excavator was used 8.64 weeks. From these figures, the Department finds that taxpayer used its Komatsu 300 excavator in non-exempt construction activities 10.53% of the time ($8.64 \text{ wks} / 82 \text{ wks} = 10.53\%$), and used the excavator in exempt activities (its gravel pit operations) 89.47% of the time.

FINDING

Taxpayer's protest is sustained. The Komatsu 300 excavator qualifies for a pro-rata exemption of 89.47%.

VIII. Tax Administration — Negligence Penalty

DISCUSSION

Taxpayer protests the Department's imposition of a ten-percent (10%) penalty. A negligence penalty may be imposed under IC 6-8.1-10-2.1 and 45 IAC 15-11-2.

45 IAC 15-11-2 provides:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-2.1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

During the audit period, taxpayer failed to pay sales tax or remit use tax on a number of taxable purchases made from Indiana vendors. Many items assessed in this audit were issues addressed in previous audits. Additionally, most of the contested issues resulted from taxpayer's failure to keep sufficient records. Taxpayer's omissions were neither justifiable nor reasonable.

FINDING

Taxpayer's protest is denied. The negligence penalty is appropriate.